

Delaware's Freedom Of Information Act

Overview of Public Records and Open
Meetings Rights and Obligations

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OVERVIEW

- Delaware's Freedom Of Information Act
 - Open Records Provisions
 - ✓ What documents must be made available for public inspection?
 - Open Meeting Provisions
 - ✓ What meetings and discussions must be open to the public?
 - Education [effective July 1, 2015]
 - ✓ AG to publish biennially a FOIA coordinator manual, hold annual training seminar and publish on a website all FOIA opinions and summaries thereof.

FOIA Policy Declaration

- Provides public with important rights to:
 - observe the performance of public officials; and
 - monitor the decisions made in formulating and executing public policy.
- FOIA is to be interpreted to further the accountability of government to the citizens of this State.

What Is A “Public Body”?

- Typically not an issue.
- Issues arises when two or more people (a “group”) gather to discuss public business.
- Issue is important because all public bodies have obligations under FOIA.

“Public Body” (continued)

- Any other legislative or executive branch agency, board, committee, subcommittee, or group:
 - Established by an act of the General Assembly, or a body established by the General Assembly;
 - Appointed by a state body or public official; or
 - Otherwise empowered by a state entity
- That is:
 - supported in whole or in part by public funds;
 - expends or disburses grants/gifts; or
 - Is impliedly or specifically charged to advise or make reports or recommendations

“Public Body” (continued)

➤ Exempt Bodies

- Any caucus of the House or Senate
- UD/DSU, except for Boards of Trustees

➤ Bodies Exempt from Open Meetings

- Public bodies having only **one member**
 - ✓ Governor, Mayor, Town Manager, etc.
- “Body of One” can appoint committees
 - ✓ Staff meetings?
 - ✓ Citizens, private sector?

Public Records Duties

- Implement Policy for Addressing FOIA Requests.
- Develop a Web Portal for Receiving FOIA Requests.
- **NEW for 2014 [HB 322]**: Provide a mailing address for receiving FOIA requests through the U.S. mail.
- Designate a FOIA Coordinator and identify on website.
 - **NEW for 2015 [HB 321]** Public bodies must provide the name and contact information for its FOIA coordinator to the AG. Within 20 working days of any change of FOIA coordinator or the FOIA coordinator's contact information, public bodies must update website and notify AG.
- Provide Reasonable Assistance to the Public in Identifying and Locating Records.
- Promptly Request Noncustodial Emails and Other Records.

Public Record Duties (continued)

- Conduct Diligent Search for Records.
- Consultation with or Referral to Originating Body.
- Respond Within 15 Business Days.
- Make Records Available for Inspection and Copying.
 - **NEW for 2015 [HB 323]:** Executive branch bodies required to publish an annual or biennial reports must post them on State website

What Documents Are “Public Records” Under FOIA?

➤ Public Record Defined

- information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

➤ AGO Carve-Outs

- Working drafts
- Personal Notes

Statutory Exemptions

- 1. Personnel, Medical, and Pupil Files, the disclosure of which would constitute an invasion of personal privacy.
 - Should redact home address, telephone & SSN.
 - Generally can't redact names, job, time sheets, attendance records, salaries or benefits for public employees, except for:
 - Retirees;
 - Employees of DOT contractors;
 - Tax, social security and elective deductions; or
 - SWAT Member.
 - Merit employees?

Statutory Exemptions (continued)

- 2. Trade Secrets/Commercial or Financial Information Obtained from a Person which is of a Privileged or Confidential Nature
 - “Trade Secrets”
 - ✓ Secret formula, process, etc.
 - Commercial or financial information
 - ✓ List of assets & liabilities, P&L statement, tax returns
 - Obtained “from a person”

Statutory Exemptions (continued)

- 3. Investigatory Files Compiled for Civil or Criminal Law Enforcement
 - “Blanket” exemption that covers a broad array of files and records
 - Housing code violation investigatory files
 - Uniform Collision Traffic Reports
 - Complaints about town ordinance violations
 - But not DOL prevailing wage law violations
 - Exemption continues after file/investigation closed
 - Exemption waived if documents or information put in public domain
 - Documents disclosed in response to discovery/subpoena

Statutory Exemptions (continued)

➤ 4. Criminal Files and Criminal Records

■ Criminal files

- Statute suggests all criminal files are closed to public scrutiny
- Blanket exemption exists even after disposition of criminal case
- Waiver

● Criminal records

- Any person can request and obtain a copy of their own criminal record, subject to redaction of witness names, intelligence personnel and aids, or any other privileged or confidential information
- All other criminal records are closed to public scrutiny

Statutory Exemptions (continued)

- 6. Records Exempted by Statute or Common Law
 - Federal Statutes
 - HIPAA? Privacy Act? FERPA?
 - State Statutes
 - Tax information
 - Personal healthcare information
 - Education records
 - Documents filed under seal
 - Common law
 - Executive privilege
 - Attorney-client communications/attorney work product
 - Personal privacy

Statutory Exemptions (continued)

➤ 9. Records Pertaining to Pending or Potential Litigation Which are not Records of any Court

- Pending Litigation
 - Quasi-judicial administrative proceedings
 - Planning Board appeals
 - Arbitration proceeding
 - **NOT** PERB matters
- Potential Litigation
 - Litigation reasonably foreseeable
 - Threat of litigation, demand letter

Public Meetings

➤ What Meetings Are Subject To FOIA?

- The formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing

➤ Quorum

- Series of sub-quorum telephone calls, or emails
 - ✓ Vote taken or consensus reached?

➤ Discussion/Action

- Public business discussed?

Public Meeting Requirements

- Publication
- Meeting Notices
- Agendas
- Minutes

Publication:

When to Publish Notice & Agenda

- Regular Meetings and Intent to Hold Executive Session
 - Notice posted 7 days in advance of meeting
 - Agenda must be posted with notice or added at least 6 hours in advance
- Special or Rescheduled Meetings
 - At least 24 hours' notice required
 - Requires a showing of an exigent circumstance or compelling need to meet on shortened notice
- Emergency Meetings Exempt from Notice Requirements
 - Necessary for the immediate preservation of public peace, health or safety, or to the General Assembly

Publication:

Where to Publish Notice & Agenda

- Publication must include conspicuous posting of notice
 - At the principal office or, if none, where meetings are regularly held and
 - For all “noncounty and nonmunicipal public bodies” – electronically on State website approved by the Registrar of Regulations.
 - For all State agencies within executive branch -- electronically on the State’s Public Meeting Calendar
- Must make a reasonable number of notices available

Publication:

What to Include in the Notice

- Date , Time and Place of Meeting
- Video conferencing
- Agenda, if determined at the time
 - ✓ If not determined when notice posted, agenda must be added at least 6 hours in advance of meeting with explanation for the delay
 - ✓ Agendas may be amended if
 1. Explanation of delay provided in amended agenda
 2. New matter came up unexpectedly after the initial posting
 3. New matter requires immediate attention

Publication:

What to Include in the Agenda

- General statement of the major issues expected to be discussed at a public meeting
 - ❖ Must draw the public's attention to the fact that specific important subject will be treated
 - “Primary Election” -- vote to open fewer polling stations
 - “Class Sizes and Enrollment” -- new teacher funding
 - “Application – PATS INC.” -- \$4.5 million IRB issuance
 - “Town Charter Changes” -- restriction of voter eligibility

Publication:

What to Include in the Agenda

- Statement of intent to hold an executive session and the specific grounds therefor

- ❖ Two views

1. Notice requirements less strict
 - Sufficient to reference statute and/or general short-hand reference
 - Not required to specify what legal, personnel, or other subjects are discussed in executive sessions
2. Must provide public with the precise reason or reasons for convening in private
 - Reference to statutory exemptions may not be enough

Executive Session

- A public body may discuss certain matters in private
 - An individual's qualifications to hold a job
 - ❑ Does not apply to current employees or personal disagreements among members of public body
 - ❑ Does not permit discussion of the selection process
 - Strategy sessions, including those involving legal advice or opinion from an attorney, about collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on bargaining or litigation position
 - ❑ May discuss litigation objectives, deployment of resources, legal issues, parameters for settlement
 - Personnel matters in which the names, competency and abilities of the individual employees or students are discussed
 - ❑ Does not apply to independent contractors
 - ❑ Does not permit discussion of the process for hiring new employees

Meeting Minutes

- Must prepare minutes even when meeting taped
- Should approve and post at next meeting
 - **NEW for 2014 [HB 320]:** Executive branch bodies that meet four or less times per year must electronically post draft minutes within 20 working days after the meeting. Prior to being posted, draft minutes may be distributed to members of the public body who were present at the open public meeting. Draft minutes may continue to be revised and corrected up until final minutes are approved by the public body at an open meeting.
- Minimal requirements
 - Attendance record
 - Accounting of each vote taken or action agreed upon
- Executive session minutes may be withheld for as long as the matters discussed remain confidential/privileged

FOIA Education

- AG to publish biennially a manual for FOIA coordinators laying out
 - Duties and responsibilities of FOIA coordinators
 - FOIA time frames, how to calculate them, and the circumstances in which they are tolled
 - Power of the public body to charge fees for requests for public records
 - An explanation of the reasons for calling an executive session, including an explanation of the strategy session exception
 - A summary of Delaware judicial opinions, Attorney General opinions, and other legal opinions issued in the preceding 2 years related to this chapter.

FOIA Education (continued)

- AG to hold annual FOIA coordinators training
 - Open to the public and noticed in accordance with FOIA
 - Training to include
 - ✓ topics included in the manual
 - ✓ a discussion of best practices for responding to requests for public records
 - ✓ question and answer session.
- AG to maintain a website containing Attorney General opinions a summary of the holding of each opinion

Contact Information And Additional Resources

- **FOIA Deputy**

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